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SUMMARY RECORD OF THE 563rd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 12 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

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Distr.: 21 November 1995

The meeting was called to order at 9.45 a.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408, A/CN.9/411)

Draft final clauses for the draft Convention (A/CN.9/411)

1. **Mr. HERRMANN** (Secretary of the Commission), introducing the note by the Secretariat containing a draft of final clauses to be included in the draft Convention (A/CN.9/411), said that it comprised a set of standard provisions, which were closely modelled, where appropriate, on those in other Conventions emanating from the Commission's work.

2. Article B, paragraph (1), concerned the date up to which the Convention would be open for signature. He wondered whether the Commission wished to fix a limit at all, as there might be reasons for leaving it open. In article E, which stated that "no reservations may be made to this Convention", the purpose was not so much to decide whether there should or should not be any reservations in the text of the draft Convention, but rather to state that, apart from those that were explicitly included, no other reservation could be made. There were a number of other Conventions of the Commission which contained a similar provision, and the language was included because otherwise there might be some doubt, despite the Vienna Convention on the Law of Treaties, which had the same rule. Article F, paragraph (1), contained a bracket round the number of instruments of ratification, acceptance, approval or accession required for the Convention to enter into force. The word "fifth" was bracketed because there might be good reason to have a lesser number, in the light of the Commission's experience with the United Nations Convention on International Bills of Exchange and International Promissory Notes, for which ratification by 10 States was required; a group of three States which were considering implementation of that Convention were facing technical difficulties owing to the requirement of 10 ratifications.

3. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) invited the Commission to consider the draft final clauses proposed by the Secretariat article by article.

Article A

4. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) noted that there were no comments.

Article B

5. **Mr. BURMAN** (United States of America) suggested that the Convention should be open for signature for two or perhaps three years from the date of adoption. While signature did not carry substantial legal significance, it did have some value for some States. In his country's experience, if a specific period was named for which a Convention would remain open for signature, that could encourage Governments to begin the process leading to ratification.

Article C

6. **Mr. EDWARDS** (Australia) noted that paragraph (3) referred to circumstances in which the place of business was in a territorial unit that was not included in a declaration of the territorial units to which the Convention was to extend. According to paragraph (2) (b) of article 4, which defined the internationality of an undertaking, "if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant" — but obviously not finally determinative — "for determining the international character of the undertaking". He wondered whether there ought to be a reference to the habitual residence in paragraph (3) of article C.

7. **Mr. HERRMANN** (Secretary of the Commission) said that article 4 dealt with a situation where a guarantor or other party might not have a place of business, in which case the habitual residence would be relevant. It had been suggested that the same clarification could also be made in article 22, which referred to the place of business as a connecting factor, or that a more general approach should be taken, which would be applicable to the entire Convention, to the effect that where there was no place of business, what counted was the habitual residence. The drafting group had proposed making such an addition to article 22, but not to article 1. The intent was, however, the same, and the Commission was already familiar with the idea from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, under which reciprocity would not obtain if the place where such an award had been made was in a territory that had not implemented the Convention. The matter would be taken up under the Commission's discussion of article 1, at which stage it might or might not be decided either to have a general provision or to deal with the matter in individual articles.

Article D

8. **Mr. BURMAN** (United States of America) pointed out that the Commission had not yet formally adopted a provision on declarations and that if it did not do so, it would not need to keep article D.

Article E

9. **Mr. SHIMIZU** (Japan) said he had two problems with articles 1 and 20, which affected his delegation's ability to accept article E. He could not understand the legal nature of article 1, paragraph (2), and asked whether an international letter of credit always had the same independent character as the undertaking defined by article 2. If that was so, there was no problem; if it was not always so, however, it did not make sense to apply the Convention to that type of letter of credit, and Contracting States should be permitted to opt out by way of reservation.

10. As to article 20, while he fully understood the underlying policy of limiting a situation in which the principal/applicant could intervene in the relationship between the guarantor and the beneficiary in order to secure the independent character of the undertaking, the way it was expressed was somewhat questionable and in fact went too far. In particular, the phrases "high probability" and "strong evidence" were acceptable if they were confined only to the present Convention, but if in the context of Japan's national legal system as a whole, such a provision would seem very strange. It would mean qualifying the strength of evidence in accordance with the legal character of each monetary claim. Paragraph (3) of article 20 was also too restrictive. While he agreed as to the value of the uniformity of application, he also valued the importance

(Mr. Shimizu, Japan)

of achieving justice in a given place, especially at the preliminary injunction stage. Accordingly, he proposedthat a Contracting State might declare at the time of signature or acceptance that it would not be bound by article 20 of the Convention.

11. **Mr. HERRMANN** (Secretary of the Commission) said, with reference to article 20, that if Japan became a party to the Convention and took advantage of the possibility of making a reservation, as that country's representative had proposed it should be able to, its courts would not apply the provisions of article 20. There might still be some uncertainties if there was a guarantor in Japan and a principal in another country, or vice versa. The question at issue, however, emerged more clearly in relation to article 1, paragraph (2). In a situation where the parties — a bank from one country and a beneficiary from another, for example — stipulated in their letter of credit that the Convention would apply, the question was, if a dispute arose and the case went before a court in Japan, whether that court, by virtue of the reservation at present being envisaged, would be bound not to recognize the parties' choice. Alternatively, the reservation might be intended to have an effect similar to that in article 12 of the United Nations Convention on Contracts for the International Sale of Goods, which would be to have a closer link to some party in Japan. The question of effect had indeed led to some controversy with regard to article 12 of the Sales Convention. Such questions should, therefore, be asked, particularly with regard to article 1, paragraph (2), in which it was important to clarify what the intended effect was, because that would dictate how to phrase the reservation.

12. **Mr. SHIMIZU** (Japan) said that the notion of an international letter of credit was still unclear, as there might be a case in which such a letter did not have the independent character defined in article 2. If the parties to a given international letter of credit chose to apply the Convention, even when that letter did not have an independent character, it was not reasonable to oblige the Contracting State to apply the provisions of the Convention to that type of letter of credit.

13. **Mr. LAMBERTZ** (Observer for Sweden) asked in connection with article 1 (1) whether a reservation would be needed if a country wished to pass a law making the Convention system mandatory in whole or in part. If parties to an undertaking agreed that the Convention should not apply to their undertaking, but the country of one party had made the Convention mandatory and it was the law of that country that applied, he assumed that the Convention would apply despite the parties' agreement to the contrary.

14. **Mr. HERRMANN** (Secretary of the Commission) drew attention to article 1 (1) (b), which provided that the Convention would apply if the rules of private international law led to the application of the law of a Contracting State. If that law contained a provision stating that the Convention was excluded in certain transactions, effect would have to be given to it. A solution might be for the Contracting State to abrogate all its national rules on independent guarantees and stand-by letters of credit and use the Convention system instead.

15. **Mr. GRANDINO RODAS** (Brazil) agreed with the Japanese representative's proposal on the possibility of making reservations to article 20. He understood that if such a reservation were made, the question of provisional court measures would be left entirely to national law.

16. **Mr. BURMAN** (United States of America), referring to questions asked about the independence of an international letter of credit, said that in his experience no international letter of credit properly denominated as such was not independent. He had found no difficulty with the language in question in letter-of-credit law. Moreover, if the provision was optional for the parties, that should provide sufficient protection.

17. With regard to the comments on article 20, he stressed that that article was a crucial provision in the Convention, since it was essential to have a fairly high level of assurance of payment. One way to achieve that was to make it clear when provisional court measures could be sought. He recommended that no modifications should be made to a provision which had been very carefully drafted.

18. **Ms. CZERWENKA** (Germany) considered that reservations should not be allowed, since they would weaken the uniform rules of the Convention, which had been developed over many years. She understood that many delegations might have problems with implementing article 20 because of their national laws, but believed that the article was a very basic one, merely signalling that provisional court measures should be allowed in certain circumstances. She agreed with the drafting group's view that the provision should stand.

19. She shared the concern expressed by the representative of Japan on article 1 (2), that the rule dealt with issues falling outside the scope of application of the Convention and that States would be bound by that rule without knowing exactly what it involved. The best way would be to delete the paragraph altogether. However, she did not think that a reservation clause would be justified.

20. She did not agree with the observer for Sweden that it was necessary to allow by way of reservation that the Convention should be mandatory. There had been general agreement that the Convention should be non-mandatory because parties to an undertaking could opt out, and she did not wish to change that approach.

21. **Mr. SHANG Ming** (China) agreed with the points made by the representative of Japan on reservations and considered that reservations should be allowed on articles of the Convention conflicting with national law.

22. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) observed that, after a consensus had been reached on the substantive terms of the Convention, those who disliked that consensus were now using the suggestion that reservations should be allowed as a last opportunity to restate their positions. He did not approve of that approach. A reservation would not apply merely to an individual country, but would restrict that country's dealings with all other signatories. He had understood that the representative of China was asking to be given freedom to choose the articles it wished to apply by means of a reservation.

23. **Mr. SHANG Ming** (China) replied that his delegation was not trying to overturn what had been agreed, but merely to express its desire that the Convention should receive broad international acceptance. In the absence of a reservation clause, many States would be unable to sign the Convention. There were certain important articles on which there were conflicting views, and it should be possible for delegations to enter reservations on those points.

24. **Mr. LAMBERTZ** (Observer for Sweden) asked for a clear answer as to whether, if Sweden ratified the Convention, it could, without entering a reservation, incorporate into its law a provision stating that the Convention was to apply as Swedish law and that the parties to an undertaking might not exclude the application of that law. If not, it might be possible to provide that parties to an undertaking might not exclude the application of Swedish law as it concerned the relation between beneficiary and principal.

25. **Mr. HERRMANN** (Secretary of the Commission) said that the desired result could probably be achieved by embodying the legal system of the Convention in Swedish law. Excluding the application of one legal system meant that another legal system was applicable. Sweden would have a right to regulate only when Swedish law, not another law, applied. For that a reservation would not be required. The obligation of a signatory, unless it entered a reservation, was to apply the Convention as it stood, including the parties' possibility of excluding its application.

26. **Mr. LAMBERTZ** (Observer for Sweden) said that he was satisfied with that reply and would not ask for the possibility of entering a reservation.

27. **Mr. BONELL** (Italy) urged delegations not to insist on having a reservation clause included in the Convention. There had been a time in the process of drafting the Convention when the approach had been that in order to get an international instrument on the table, it was better to proceed as quickly as possible, without worrying too much about content, and that it would always be possible to put in a reservation at a late stage. However, it was not possible in an instrument of private international law to pick out certain articles from a systematic body of rules and then pretend that the substance survived. All too many countries might wish to take advantage of the possibility of making reservations, and the result would be chaos.

28. **Mr. MARKUS** (Observer for Switzerland), agreeing with the representative of Italy, said that reservations should be avoided wherever possible. The Chinese proposal for a wide range of reservations would, in his view, render the application of the entire draft Convention virtually impossible. It should be borne in mind that a reservation entered to a rule by one Contracting State would lead to non-application of that rule by the other States parties and their courts. In particular, reservations should not be permitted on article 20. That article was the cornerstone of the draft Convention and dealt with its most sensitive legal issue. Like the representative of Germany, he regarded article 20 as a minimum standard for national procedural law and not as a precise rule. States with higher standards were unjustified in fearing that without the possibility of reservations they would sacrifice something procedurally. With regard to the Japanese proposal to allow reservations to article 1, paragraph (2), he would have preferred to adopt the solution of deleting the provision, as suggested by the German delegation, but it was now too late.

29. **The CHAIRMAN**, speaking as representative of Singapore, said that his delegation was not in favour of including in the draft Convention a provision allowing reservations to be made to any of its articles. The Commission had spent years endeavouring to achieve uniformity in the law on stand-by letters of credit and independent guarantees. To permit reservations would mean that the international trading community would have no certainty as to the rules governing payment.

30. **Mr. MAHASARANOND** (Thailand) said that his delegation shared the view that reservations should be possible. The draft Convention was a type of model law, and States should be allowed flexibility in its implementation. Otherwise they might be reluctant to become parties to it.

31. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his delegation considered that the discussion on whether to allow reservations should not be linked to individual articles of the draft Convention, since full agreement had already been reached on the text. Adoption of the Chinese proposal could have led to reservations permitting non-application of the entire draft Convention, which was unacceptable. The instrument contained a number of flexible provisions, particularly those in articles 21 and 22. Article E of the final clauses should therefore be retained; that would contribute towards the pursuit of the Commission's aim of fostering the harmonization of international trade law.

32. In Morocco, ratification of a convention gave rise to the enactment of a new law and the corresponding amendment of previous laws. The question whether international law should prevail over national law in cases of conflict was a matter for consideration by jurists and not the Commission. Conflict situations could arise in connection with all international instruments, not just the present draft Convention.

33. **Mr. EDWARDS** (Australia) said that after all the years spent on achieving consensus, the moment had now come for the Commission to decide whether it wished to adopt article E. He believed that there was considerable support for its retention.

34. **Ms. BAZAROVA** (Russian Federation) said that her delegation was in favour of retaining article E. Accepting that some countries might not become signatories to the draft Convention was preferable to envisaging the difficulties to which the entering of reservations would give rise. It was more important to have a unified international instrument.

35. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) pointed out that the draft Convention reinforced party autonomy in many respects. If parties were denied the right to make reservations, that would to some extent be counterbalanced by their ability to adapt the rules to suit themselves. He felt that there was general agreement that reservations should not be permitted and took it that the Commission wished to approve article E as it stood.

The meeting was suspended at 11.25 a.m. and resumed at 11.50 a.m.

Article F (A/CN.9/411)

36. **Mr. BURMAN** (United States of America) said that his delegation had originally considered that five ratifications constituted a convenient threshold for entry into force of the draft Convention, but that he understood that some delegations might prefer three.

37. **Ms. CZERWENKA** (Germany) said that in her delegation's view, the adoption of a smaller minimum number of ratifications would impair the Convention's international character. The text of the article should therefore retain the word "fifth".

38. **Mr. LAMBERTZ** (Observer for Sweden) pointed out that the word "States" appearing in the second line of paragraph (3) should in fact be in the singular.

39. **Mr. BURMAN** (United States of America) wondered whether it should be specified that the conflict-of-laws rule under paragraph (1 *bis*) of article 1 (A/CN.9/XXVIII/CRP.2), which presumably had force solely in a Contracting State, also applied only to undertakings issued on or after the date when that State became a party to the draft Convention.

40. **Mr. HERRMANN** (Secretary of the Commission) said that there were arguments on both sides. It could be said that whenever a court had to determine a conflict-of-laws issue, the provisions should apply irrespective of when the Contracting State accepted such rules and the undertaking was issued. If, however, it was felt that some time-limit should be set, it would be necessary to find the right place for it. The present provision did not cover the problem, since it did not refer to articles 21 and 22. In a substantive law regime there was good reason for a time-limit in that the parties to a transaction ought to know their obligations and rights. However, he felt there was less practical need for such a limit in relation to the question as to which rules of private international law applied, which would indirectly determine the relevant substantive law. The differences were not great. There seemed to him less need for preventing the parties from getting into a situation in which their instrument would later become subject to a private international law regime because they had not foreseen at the time that their State would become a Contracting Party.

41. **Mr. BURMAN** (United States of America), observing there to be little interest in the issue, withdrew his suggestion.

42. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that article F, with the drafting change suggestion by Sweden, was acceptable.

Article G (A/CN.9/411)

43. **Mr. BURMAN** (United States of America) wondered whether it would be possible to change the word "denunciation", which in English was very strong, for a milder term such as "withdrawal". He realized that the word "denunciation" was the normal term used in treaty language, but many people examining the treaty tended to assume that it implied a major political act rather than mere withdrawal. It was purely a matter of drafting.

44. **Ms. CZERWENKA** (Germany) considered that the text should stick to the normal treaty language, since a change might raise the question as to why it had been made. In regard to paragraph (1), she wondered whether it was a common practice to allow denunciation "at any time", which could mean before the Convention entered into force. Some conventions set restrictions on when they could be denounced.

45. **Mr. HERRMANN** (Secretary of the Commission) said that the paragraph implied that only a Contracting State could denounce the Convention, though any Government was of course free to make any declaration it wished on the subject.

46. **Ms. CZERWENKA** (Germany) said that use of the term "Contracting State" did not make it entirely clear whether the treaty had entered into force for that State.

47. **Mr. HERRMAN** (Secretary of the Commission) said that if, for example, only three States had so far signed the Convention, any one of them could reduce the chances of its entering into force by denouncing it.

48. **Mr. PELICHET** (Observer for the Hague Conference of Private International Law) asked whether the fact that no provision had been made for a federal State to denounce the Convention on behalf of one of its territorial units was deliberate.

49. **Mr. HERRMANN** (Secretary of the Commission) said that if a federal State wished to have other clauses, the Commission would first have to decide on the principle and the Secretariat would then assist such a State to find the additional wording necessary.

50. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he took it that the Commission preferred to retain the word "denunciation" and was satisfied with the text of the article as it stood.

Report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add. 1-4)

51. **Mr. SAHAYDACHNY** (Secretariat), introducing the report of the drafting group (A/CN.9/XXVIII/CRP.2 and Add. 1-4), said that article 1 contained a new paragraph (1 *bis*) that was not new in substance, but represented a reformulation of the previous paragraph (3) concerning the application of articles 21 and 22. The drafting group had considered moving that provision to chapter VI, but had decided to keep it in article 1 in order to clarify the intended effect. The group had also discussed the advisability of including the term "habitual residence" to cover cases in which a party did not have a "place of business", the term used in paragraph (1) (a), but had decided against, partly because the possibility of issuing an undertaking from a "habitual residence" was suggested by the use of that term in article 4 (2) (b). The drafting group had also felt that use of "habitual residence" for "place of business" as a general rule for interpretation of the Convention might have unforeseen implications. As the term was needed in article 4 (2) (b), its inclusion as a general rule in article 1 might appear to repeat that provision. Moreover, such a rule of interpretation might detract from the general approach used in the Convention, that relevant information such as the place of issuance should appear on the face of the instruments. It might be possible to include a specific reference to the "habitual residence" in article 22 for the purpose of determining the applicable law, but that might require a reference to the term in article 1 (1) (a).

52. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that as members might want to think over the observations just made regarding the term "habitual residence", he would return to the question later.

53. He took it that paragraph (2) reflected the decisions of the Commission.

54. He asked whether paragraph (1 *bis*) reflected the Commission's request to the drafting group to produce a more accurate and satisfactory text.

55. **Ms. CZERWENKA** (Germany) said that Germany had several problems with the draft of article 1, paragraph (1 *bis*). The opening phrase "In any situation involving a choice between the laws of different States" was presumably intended to replace the word "international", but she did not recall any suggestion that that word should be interpreted in such a way. She was not sure what the phrase meant, but upon its meaning depended the application of articles 21 and 22. In her view, the text lacked clarity. Germany's position was that the scope of articles 21 and 22 should be limited to international undertakings, a view that had been reflected in the previous version of the draft Convention reproduced in document A/CN.9/408 by use of the term "international undertakings". There should only be one definition of internationality, so that the scope of application for articles 21 and 22 would be limited to international undertakings as defined in articles 2 and 4, but that view had not been properly reflected in the wording chosen by the drafting group. The opening phrase of paragraph (1 *bis*) was not identical to the definition given in article 4 and the text did

(Ms. Czerwenka, Germany)

not reflect the discussion in the Commission. There also appeared to be a problem with the general structure of paragraphs (1) and (1 *bis*). Paragraph (1) stated that the Convention, meaning the Convention as a whole and not the Convention except for articles 21 and 22, applied in certain specific circumstances. But should specific provisions rather than the Convention as a whole be applied, problems might be raised regarding the application of articles 5 and 6. In Germany's view, those articles should be seen as part of articles 21 and 22. In short, the draft text had not captured the original idea that the Convention applied to all international undertakings defined in article 2 but that the substantive provisions — that is, articles 7 to 20 — should have a more limited scope of application. She did not think that the text had solved the problems discussed in the Working Group. Germany had put forward a drafting proposal, which, however, had not been accepted by the Secretary.

56. **Mr. HERRMANN** (Secretary of the Commission) said that it was not at all up to the Secretary to decide whether a proposed amendment was acceptable or not. He had seen the draft submitted, had made comments upon it and had understood that the explanation he had given had satisfied the representative of Germany. One reason why there was no specific link between paragraphs (1) and (1 *bis*) arose from the drafting technique used by UNCITRAL, according to which no cross-reference was made to another part of the same article. Consideration had been given to placing the provision in a later part of the Convention, but that would only have increased Germany's concern. It might be possible to introduce a new article, which would be article 23 in chapter VI, and amount to a separate convention within the Convention.

57. **Mr. SAHAYDACHNY** (Secretariat) read out the suggested text, which was as follows:

"**Article 23**

"The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of article 1, paragraph (1)."

The meeting rose at 12.40 p.m.